

1 KAREN A. OVERSTREET
Chief Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 In re)
) Chapter 7
8 LISA SCHMIDT-HENDERSON and)
DARRIN HENDERSON,)
9)
Debtors.)
10) Bankruptcy No. 09-15664
)
11)
SOUND BILLING SERVICES, INC.,)
12 a Washington Corporation,) Adversary No. 09-01327
13)
Plaintiff.)
14)
v.) **MEMORANDUM DECISION**
15)
LISA SCHMIDT-HENDERSON and)
16 DARRIN HENDERSON, individually) **NOT FOR PUBLICATION**
and on behalf of the marital)
17 community; LIBERTY BILLING,)
LLC, a Washington Limited)
18 Liability Company,)
)
19 Defendants.)
)

20 This matter came before the Court for trial on May 13, 2010,
21 May 20, 2010, and July 15, 2010. Plaintiff was represented by
22 William A. Olson of Aiken, St. Louis & Siljeg, P.S., Seattle,
23 Washington and the defendants were represented by David B. Adler,
24 Seattle Washington. The Court, having considered the evidence,
25 including the testimony of witnesses and the documents and exhibits
26 which were admitted into evidence, issues this Memorandum Decision
27 as its findings of fact and conclusions of law for purposes of
28

MEMORANDUM DECISION - 1

1 Bankruptcy Rule 7052. The Court has jurisdiction of this matter
2 pursuant to 28 U.S.C. §§ 157 and 1334 and this is a core proceeding
3 under 28 U.S.C. § 157(b)(2)(C) and (I).¹

4 For the following reasons, I find that (i) SBS is entitled to
5 an order requiring Ms. Schmidt and Liberty Billing, LLC ("Liberty")
6 to return to SBS certain confidential information in their
7 possession as described in more detail below; (ii) the obligation
8 of Ms. Schmidt to return confidential information is not
9 dischargeable; and (iii) Ms. Schmidt is entitled to judgment
10 against SBS in the amount of \$10,000 for unpaid compensation.

11 I. BACKGROUND

12 The parties bring various claims against each other arising
13 out of a Subcontractor Agreement entered into between Sound Billing
14 Services, Inc. ("SBS") and Lisa Schmidt-Henderson (Ms. Schmidt) in
15 1999 (the "Subcontractor Agreement"). Under that agreement,
16 Ms. Schmidt provided medical billing services to customers of SBS.
17 Plaintiff's causes of action in the complaint include (1) breach of
18 contract, including misuse of confidential information, unlawful
19 competition, and unsatisfactory performance under the contract;
20 (2) misappropriation of trade secrets within the meaning of RCW
21 19.108.010(2) and violation of the Uniform Trade Secrets Act, RCW
22 19.108; (3) common law conversion of the plaintiff's confidential
23 information; (4) tortious interference with contractual relations
24 and business expectations; (5) objection to discharge on two bases,

25
26 ¹ Unless otherwise indicated, all Code, Chapter, Section and
27 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et seq.*

1 that injunctive relief necessary to stop a violation of the
2 Subcontractor Agreement is not a "claim" under Bankruptcy Code
3 § 101(12) and is therefore non dischargeable, and that the claim of
4 SBS is nondischargeable under § 523(a)(6) for willful and malicious
5 injury. Plaintiff's reply brief makes it clear that the action is
6 against Ms. Schmidt personally and her marital community, but is
7 not an action against Mr. Henderson personally.

8 In her initial answer, Ms. Schmidt asserted a counterclaim
9 against SBS for breach of contract in failing to pay her for
10 services performed from December 2008 through February 9, 2009, and
11 a counterclaim for negligent infliction of emotional distress.
12 Liberty also asserted a counterclaim against SBS for unlawful
13 interference with its business operations. Six calendar days
14 before the trial date, defendants filed a motion seeking authority
15 to amend the complaint to assert certain additional defenses, and
16 to add two additional counterclaims, a claim to pierce the
17 corporate veil of SBS and impose liability on Lynn Hatter, its
18 president and sole shareholder, and a counterclaim against Ms.
19 Hatter and SBS for violation of RCW 49.46.010(2) and 49.48.010
20 (unlawful refusal to pay wages). On the first day of trial, I
21 denied defendants' request as to the additional counterclaims but
22 granted the request as to the additional defenses. My oral ruling
23 on that motion is incorporated herein by this reference.

24 In pretrial proceedings, I granted the defendants' motion to
25 dismiss plaintiff's claim that Ms. Schmidt had violated the
26 noncompete provision of the Subcontractor Agreement because I held
27 that the noncompete provision contained in that agreement expired
28 by its own terms on April 21, 2002, two years after the expiration

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1 of the Subcontractor Agreement on April 21, 2000. I also granted
2 the defendants' motion to dismiss the Section 727 objection to
3 discharge claim as to any claim based upon a violation of the
4 noncompete provision. I denied the balance of the defendants'
5 motion to dismiss leaving the following claims of plaintiff for
6 trial: (i) defendants' breach of contract by misuse of confidential
7 information and unsatisfactory performance under the contract; (ii)
8 defendants' Misappropriation of trade secrets within the meaning of
9 RCW 19.108.010(2) and violation of the Uniform Trade Secrets Act,
10 RCW 19.108; (iii) defendants' common law conversion of the
11 plaintiff's confidential information; (iv) defendants' tortious
12 interference with contractual relations and business expectations;
13 (v) objection to defendant Schmidt and Henderson's discharge on the
14 ground that injunctive relief necessary to stop a violation of the
15 contract (Ms. Schmidt's use of Confidential Information) is not a
16 "claim" under Bankruptcy Code § 101(12) and is therefore non
17 dischargeable; (vi) objection to the debtors' discharge under
18 523(a)(6) for willful and malicious injury. The following claims
19 of defendants were also left for trial: (i) Ms. Schmidt's claim for
20 breach of contract for failure to pay her amounts due for work
21 performed from December 2008 through February 9, 2009; (ii)
22 Ms. Schmidt's counterclaim for negligent infliction of emotional
23 distress; and (iii) the claim by Liberty against SBS for wrongful
24 interference in Liberty's business.

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1 of any nature received or produced by or
2 delivered to it in conjunction with its
3 performance hereunder (collectively referred to
4 as "confidential information"). All
5 confidential information is the property of SBS
6 and shall be returned/delivered to SBS upon
7 termination of this Agreement. Contractor
8 recognizes and acknowledges that the
9 confidential information constitutes a
10 valuable, special, and unique asset of SBS and
11 is otherwise protected by privileges.
12 Contractor shall not disclose nor permit any
13 third person to use, examine, or make copies of
14 any confidential information or any information
15 derived from confidential information whether
16 prepared by contractor, SBS, or otherwise,
17 which may come within the contractor's
18 possession or control.

19 Ms. Schmidt also signed a Privacy Agreement with SBS which
20 required her to return or destroy all Protected Health Information,
21 as defined in that agreement, upon termination for any reason. Ex.
22 P-6, ¶ 3.3(a). "Confidential Information," as defined in the
23 Subcontractor Agreement and "Protected Health Information," as
24 defined in the Privacy Agreement, are referred to hereinafter
25 collectively as the "Protected Information."

26 The Subcontractor Agreement also contained a noncompete
27 provision which prohibited Ms. Schmidt from directly or indirectly
28 engaging in any business which competes with any aspect of the
business of SBS and from having any business dealings or contact
with any customer or client of SBS for 24 months after "termination
of this agreement for any reason." Ex. P-5, ¶ 8. The noncompete
provision expired on April 21, 2002, two years after the expiration
of the Agreement on April 21, 2000. The parties tried, but were
unable to negotiate an extension of the Subcontractor Agreement and
instead continued their business arrangement without change until
the end of 2008.

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1 Toward the end of 2008, the parties otherwise productive and
2 cordial relationship deteriorated. Ms. Hatter was anxious for
3 Ms. Schmidt to renew her formal contractual relationship with SBS
4 and Ms. Schmidt was reluctant to agree to a new noncompete
5 provision. Ms. Hatter raised concerns about Ms. Schmidt's work
6 performance, and Ms. Schmidt disputed any performance problems.
7 The relationship finally fell apart at a meeting between Ms. Hatter
8 and Ms. Schmidt on January 29, 2009. At the meeting, Ms. Hatter
9 demanded that Ms. Schmidt enter into a new contract with SBS and,
10 as a condition to the new contract, Ms. Schmidt would be put on a
11 90-day probation period during which Ms. Hatter would be assessing
12 her work performance. Ms. Schmidt was not willing to agree to a
13 probationary period or to a new contract and wanted an opportunity
14 to consult with a lawyer. At the conclusion of the meeting,
15 Ms. Hatter gave Ms. Schmidt a letter which stated that
16 Ms. Schmidt's contract with SBS would be terminated effective 60
17 days from January 29, 2009. Ex. P-11.

18 The next day, after discussions between Ms. Hatter and
19 Ms. Schmidt's husband, Darrin Henderson, Ms. Hatter sent an email
20 to Ms. Schmidt stating that notwithstanding the termination letter,
21 she was willing to renew the contract "contingent of (sic) the same
22 terms we discussed" at the previous days' meeting, and she asked
23 Ms. Schmidt to let her know if she was agreeable to that by Monday,
24 February 2, 2009. Ex. D-12. An email on February 3, 2009, Ex. D-
25 13, indicates that the parties were still negotiating the terms of
26 a new agreement as of that date. By February 9, 2009, however,
27 neither party had contacted the other. Ms. Hatter became concerned
28 that Ms. Schmidt was no longer processing claims for SBS clients

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1 because Ms. Schmidt did not appear to have uploaded any insurance
2 claims from January 31, 2008 to February 8, 2009, and because
3 Ms. Schmidt had not sent SBS her January month end reports.
4 Ms. Schmidt testified that due to the stress of the situation, she
5 was not able to work between January 30 and February 6, and during
6 that time she did not upload any insurance claims. The evidence
7 showed, however, that Ms. Schmidt completed the upload of insurance
8 claims for that period on February 6, 7 and 8. Ex. D-32, Ex. D-73.

9
10 On February 9, 2009, Ms. Hatter faxed Ms. Schmidt Exhibit P-
11 13, a letter expressing her concerns about whether Ms. Schmidt was
12 going to continue to perform her services for SBS. The same day,
13 Ms. Schmidt's attorney, Matthew O'Conner, delivered a letter to
14 Ms. Hatter which advised that Ms. Schmidt had rejected the proposed
15 new subcontractor agreement and that Ms. Hatter should no longer
16 communicate directly with Ms. Schmidt. The letter did not state
17 one way or another whether Ms. Schmidt was continuing to work for
18 SBS, however, the first sentence of the letter implies that
19 Mr. O'Connor was proceeding on the assumption that their agreement
20 had been terminated on January 29, 2009. The night of February 9,
21 Ms. Hatter sent out an email to all of Ms. Schmidt's customers
22 advising them not to send any billing information to Ms. Schmidt
23 with no explanation for this direction. Ex. P-37.³ Ms. Schmidt
24 sent an email to the same customers the next day, February 10,
25 2009, advising them that effective immediately, she was no longer

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27
28 ³ Although Ex. P-37 is dated January 9, 2009, Ms. Hatter testified the email should have been dated February 9, 2009.

1 affiliated with SBS and would not be handling their accounts. Ex.
2 D-14. After February 9, Ms. Schmidt did no further work for SBS.

3 Exhibit P-13, SBS' letter dated February 9, 2009, requested
4 that Ms. Schmidt provide month end reports, and make available to
5 SBS all data pertaining to SBS's clients, including the
6 Confidential Information. The letter further instructed
7 Ms. Schmidt to return "a current backup for all clients currently
8 in your [Ms. Schmidt's] possession" on two USB data disks which
9 Ms. Hatter separately mailed to Ms. Schmidt. The letter also
10 requested the immediate transfer of "copies of all data" in
11 Ms. Schmidt's possession so that SBS could provide continuing
12 service to the customers Ms. Schmidt had been servicing.

13 In response to the letter, Ms. Schmidt assembled all of the
14 written documentation and information in her possession, which
15 included 30 boxes at her home and 108-110 boxes in a separate
16 storage facility. She notified SBS that the boxes at her home
17 would be ready for pick up on February 12, 2009. Ms. Hatter did
18 not arrange to pickup those boxes, however, until February 17,
19 2009. Ms. Schmidt testified that in one of the boxes at her home,
20 clearly marked, were the files necessary to complete any unfinished
21 billing for her SBS clients. Ms. Schmidt made a copy of all of the
22 SBS Working Files on her computer on the two data disks provided to
23 her and returned the disks to SBS by February 12, 2009. According
24 to the testimony of Ms. Schmidt, she and Ms. Hatter made plans to
25 meet at the storage unit to transfer control on March 18, 2009, but
26 on March 13, 2009, SBS took control of the storage unit by placing
27 its own lock on the unit.

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1 Following Ms. Schmidt's notice to her customers that she was
2 no longer associated with SBS, a number of Ms. Schmidt's former SBS
3 customers, some of whom testified at trial, contacted her to see if
4 she would be willing to continue doing their billing work.⁴ After
5 considering this option, Ms. Schmidt decided to form her own
6 billing company and formed Liberty on February 19, 2009. Ex. D-3.
7 In addition, on the advice of her lawyer that she was not bound by
8 any noncompete agreement with SBS, Ms. Schmidt sent a standard form
9 letter announcing her business in a mass mailing to mental health
10 physicians and service providers, including her former SBS clients.
11 Ex. D-10, Ex. P-14. She obtained the addressees for her mass
12 mailings from public sources. Exs. D-6, D-7, D-8, D-9. As of the
13 time of trial, 17 former SBS customers (the "SBS Former Clients"),
14 listed in Ex. D-72, were under contract with Liberty as their
15 billing company. Ex. D-2 (Billing Agreements). These clients
16 terminated their business with SBS between February 25, 2009 and
17 August 10, 2009. Exs. D-41-D59; D-72.

18 SBS continued billing services for the remaining 28 clients
19 formerly handled by Ms. Schmidt. Tamera Huffman, a biller with
20 SBS, took over the billing for 12 of Ms. Schmidt's former clients.
21 Ms. Hatter testified that it took many additional hours of her time
22 as well as the work of Ms. Huffman, to put the files for the 28
23 customers back in order so that the billing work for them could
24 continue. Ms. Hatter testified that a number of these customers
25 complained about the disruption to their business, including Dr.
26 Alan Weisser, who testified at trial. It was clear from the

27
28 ⁴ See testimony of Jaqueline Ball, James Roark, Bonita Cantu,
Linda Ayers.

1 testimony of the physicians and nurses who testified at trial for
2 both plaintiff and defendants that competent and timely billing for
3 patient services is critical to maintaining a steady stream of
4 revenue for these professionals, especially those in solo practice
5 or small offices.

6 **III. CONCLUSIONS OF LAW**

7 Based upon the foregoing findings of fact, the Court makes the
8 following conclusions of law.

9 **A. Common Law Duty of Loyalty and Contractual Duty as to 10 Confidential Information.**

11 The Subcontractor Agreement required Ms. Schmidt to return all
12 Confidential Information to SBS at the termination of her
13 relationship with SBS. The Privacy Agreement required Ms. Schmidt
14 to return or destroy all Protected Health Information at the
15 termination of her work for SBS and to not retain a copy of that
16 information. I conclude that Ms. Schmidt substantially complied
17 with her obligations with regard to the Protected Information,
18 which obligations survived the expiration of the term of the
19 Subcontractor Agreement. Following the cessation of her work for
20 SBS, Ms. Schmidt returned all written documentation promptly to SBS
21 and a copy of all of the electronic information she had for SBS
22 clients.

23 The only failure of Ms. Schmidt to comply with her obligations
24 regarding Protected Information was that she retained on her own
25 computer an electronic copy of Protected Information she had
26 developed during her working relationship with SBS. Ms. Schmidt
27 claimed she needed these electronic files to prove the amount of
28 her counterclaim and that she used this information solely for the

1 purpose of calculating the amount she was owed for work done from
2 December 1, 2008 through February 9, 2009. She testified that she
3 did not divulge the information to any third parties and there is
4 no evidence that she did. Because she had access to that
5 information, however, Ms. Schmidt was able to use the information
6 in the seamless continuation of her services to the SBS Former
7 Clients.

8 SBS seeks three remedies with regard to the Protected
9 Information: (i) a return of all of such information that does not
10 relate to the SBS Former Clients, (ii) compensation for Liberty's
11 use of the Working Files of the SBS Former Clients, and (iii)
12 damages for the loss of revenue related to the SBS Former Clients
13 who switched to Liberty. I find that SBS is entitled to the return
14 or destruction of all Protected Information in Ms. Schmidt's
15 possession which pertains to any client other than one of the SBS
16 Former Clients. I do not find, however, that SBS is entitled to
17 any compensation or damages from Liberty or Ms. Schmidt for their
18 use of SBS Working Files related to the SBS Former Clients.

19 Liberty and Ms. Schmidt avoided the expense of recreating the
20 SBS Former Clients' electronic Working Files because Ms. Schmidt
21 had retained a copy of those files on her computer and was able to
22 utilize them when Liberty took over the billing for these clients.
23 It is not clear how much labor in terms of file setup time
24 Ms. Schmidt actually saved by having this information, nor is that
25 relevant, because I conclude that the SBS Former Clients were the
26 owners of the information in the Working Files and that SBS had an
27 obligation to provide all of the information to the SBS Former
28 Clients upon the termination of their contracts.

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1 Exhibit P-38 contains the Billing Services Agreements between
2 SBS and the SBS Former Clients. Paragraph 8 of the standard SBS
3 agreement requires SBS, at termination of the agreement, to provide
4 to the customer an itemized printout of all patient accounts with
5 outstanding balances and a printed history of an individual
6 patient's account for a period of three months. In addition, SBS
7 is required to maintain the customer's electronic data base for a
8 period of seven years and to give the customer the option to obtain
9 a complete printout of all patient accounts. Thus, the SBS Former
10 Clients had the right to demand nearly everything contained in SBS'
11 Working Files at the termination of their contracts. Ms. Hatter
12 testified that there was a difference between the SBS Working Files
13 and the raw patient data and that in her judgment, former customers
14 of SBS would not have had a right to any notes of conversations
15 between the SBS biller (in the case of the SBS Former clients, Ms.
16 Schmidt) and a patient or insurance representative, and other
17 information collected by the biller. I fail to see how a proper
18 patient account could be provided to these customers, however,
19 without that information, and also find that it would be a very
20 laborious task to separate all of the information.

21 I conclude that while Ms. Schmidt and Liberty may have saved
22 some time in labor recreating the SBS Former Client Working Files,
23 SBS saved the cost of having to provide to its former clients the
24 patient records in those Working Files. The SBS Former Clients who
25 testified at trial testified that Liberty used their patient files
26 with their permission.

27 I further find that SBS is not entitled to any damages for
28 loss of revenue due to the SBS Former Clients shifting their

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1 business to Liberty. In pretrial proceedings, I held that as of
2 February 2009, Ms. Schmidt was not subject to any noncompete
3 obligation. Her solicitation of SBS customers was lawful. There
4 is no evidence that any SBS Former Client switch to Liberty because
5 Liberty had access to their electronic patient files. Rather, the
6 evidence proved that these customers switched to Liberty was
7 because of their personal relationship with Ms. Schmidt and their
8 high level of satisfaction with her work.

9 For the foregoing reasons, I find that Ms. Schmidt and Liberty
10 must return or delete all electronic Protected Information on their
11 computers related to any SBS customer other than the SBS Former
12 Clients. All other SBS claims related to Protected Information are
13 denied.⁵

14 **B. Defendants' Misappropriation of trade secrets within the**
15 **meaning of RCW 19.108.010(2) and violation of the Uniform Trade**
Secrets Act, RCW 19.108.

16 Plaintiff has the burden of proving that legally protected
17 secrets exist. *Boeing Co. v. Sierracin Corp.*, 108 Wash. 2d 38, 49,
18 738 P.2d 665 (1987). A customer list can be a protected trade
19 secret if it meets the criteria of the Trade Secrets Act. *American*
20 *Credit Indem. Co. v. Sacks*, 213 Cal.App.3d 622, 262 Cal. Rptr. 92
21 (1989). Trade secret protection will not generally attach to
22 customer lists, however, where the information is readily
23 ascertainable. *Boeing, supra*. "If information is readily
24 ascertainable from public sources such as trade directories or
25 phone books, then customer lists will not be considered a trade
26

27 ⁵ Because I find that Ms. Schmidt had a contractual duty with
28 regard to Protected Information, I do not need to consider whether
she also had a common law duty of loyalty as to that information.

1 secret and a prior employee, not subject to a noncompetition
2 agreement, would be free to solicit business after leaving
3 employment." *Ed Nowogroski Insurance, Inc. v. Rucker*, 137 Wash.2d
4 427, 441, 971 P.2d 936 (1999). In this case, all of SBS' clients
5 were readily ascertainable from public records, and Ms. Schmidt put
6 into evidence the public sources she used to send her solicitation
7 letters. Moreover, because Ms. Schmidt and Liberty were not
8 subject to a noncompete agreement, they were free to solicit former
9 clients of SBS after Ms. Schmidt ended her relationship with SBS.

10 SBS also contended that its forms, such as its Billing
11 Services Agreement (Exs. P-18, P-38), accounts receivable forms (P-
12 20), billing services authorization form (Ex. P-23), facsimile
13 cover sheet (Ex. P-24), patient registration form (Ex. P-26),
14 insurance verification form (Ex. P-28), daysheets (Ex. P-30), and
15 practitioner profile sheet (Ex. P-32) were all protected document
16 forms within the Trade Secrets Act. I conclude that none of these
17 forms is subject to trade secret protection. They are all forms
18 that could easily be created by a person in the medical billing
19 industry, some are merely excel spreadsheets, and most, if not all,
20 originated with Lindsay Roark, Ms. Hatter's and Ms. Schmidt's
21 former employer. Mr. Roark testified at trial that Ms. Schmidt and
22 Liberty had their permission to use all forms which originated in
23 their office and that this consent was memorialized in a writing
24 dated December 2, 2009. Ex. D-18.

25 For the foregoing reasons, I find that defendants are not
26 liable to plaintiff for misappropriation of trade secrets or
27 violation of the Uniform Trade Secrets Act.

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1 **C. Common Law Conversion.**

2 Having found that Ms. Schmidt and Liberty are not liable to
3 SBS under the Washington Trade Secrets Act, I conclude that they
4 are not, for the same reasons, subject to any liability under a
5 common law theory of conversion. *See also Nowogroski, supra*
6 (Common law conversion preempted by trade secrets act).

7 **D. Tortious interference with contractual relations and business**
8 **expectations.**

9 SBS has asserted a claim that Liberty and Ms. Schmidt
10 unlawfully interfered with its contractual relations. Liberty has
11 asserted a similar claim against SBS. To prove a claim for
12 tortious interference with contractual relationships and business
13 expectations, the party asserting the claim has the burden of
14 showing:

- 15 (1) The existence of a valid contractual
16 relationship or business expectancy;
- 17 (2) The defendant's knowledge of and intentional
18 interference with that relationship or
19 expectancy;
- 20 (3) A breach or termination of that relationship or
21 expectancy induced or caused by the
22 interference;
- 23 (4) An improper purpose or the use of improper
24 means by the defendant that caused the
25 interference; and
- 26 (5) Resultant damage. *Eugster v. City of Spokane*,
27 121 Wn.App. 799 (2004).

28 Neither party submitted any evidence of an improper purpose on
the part of the other that would support a cause of action for
tortious interference with contractual relations, therefore, the
Court finds against each of them on their respective claims.

E. Defendant Schmidt's claim for breach of contract.

Ms. Schmidt has asserted a counterclaim for unpaid
compensation relating to her billing work in January and February

1 2009 for SBS clients. SBS counters that Ms. Schmidt was fully paid
2 for her work and that because she breached her agreement with SBS
3 by failing to complete billing activities for her SBS customers in
4 January and February, she is not entitled to any further
5 compensation.

6 The Subcontractor Agreement provides in paragraph 4 that
7 Ms. Schmidt was to receive two-thirds of the money received by SBS
8 from the customers whose accounts were handled by Ms. Schmidt plus
9 two-thirds of each patient setup fee which was received by SBS from
10 the same customers. After the expiration of the Subcontractor
11 Agreement in 2000, the parties continued this compensation
12 arrangement. The important aspect of this arrangement is that
13 Ms. Schmidt was not entitled to her commission until SBS clients
14 received payment from their patients and in turn paid the
15 commission on those receipts to SBS.

16 1. Breach of Contract.

17 In order to determine whether Ms. Schmidt has a right to
18 additional compensation, a determination must be made as to whether
19 she breached her billing obligations to SBS clients. There was
20 considerable debate at trial over whether Ms. Schmidt was
21 terminated by SBS or whether she quit. Ms. Hatter gave an
22 unequivocal notice of termination to Ms. Schmidt on January 29,
23 2009, then followed up immediately with a very ambiguous letter
24 which offered to recall the notice of termination. Ms. Schmidt,
25 uncharacteristically, ceased her billing activities for a one week
26 period between January 30 and February 6, giving Ms. Hatter the
27 impression that she had stopped her SBS work. By the time
28 Ms. Schmidt resumed her billing activities on February 6, 7, and 8,

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1 Ms. Hatter's concern had caused her to notify clients not to send
2 any more information to Ms. Schmidt, which effectively terminated
3 Ms. Schmidt's ability to continue her billing for these clients.
4 Ms. Schmidt then sealed the termination with her letter to her SBS
5 customers on February 10.

6 From the foregoing actions of the parties, I conclude that the
7 agreement between SBS and Ms. Schmidt was terminated by mutual
8 agreement on February 9, 2009. Neither party handled the
9 termination well, so they are equally responsible for the
10 disruption in customer service that followed.

11 2. Ms. Schmidt's Right to Compensation.

12 Ms. Hatter testified that when a billing specialist is
13 terminated, they are not entitled to any further payments for work
14 done prior to termination unless receipts come in from the
15 customers prior to the termination date. Neither the language of
16 the expired Subcontractor Agreement nor the nine-year practice of
17 the parties, however, supports her assertion. I conclude that
18 Ms. Schmidt had a right to be paid for the billing work she
19 completed.

20 There is no evidence that Ms. Schmidt failed to comply with
21 any of her duties in December 2008 and no evidence of any
22 disruption to SBS customers related to that work. Therefore, I
23 conclude that she is entitled to the compensation due her for work
24 that month. Ms. Schmidt prepared Exhibit D-69A showing the amounts
25 received by SBS from Ms. Schmidt's customers in January 2009. She
26 testified that these receipts related solely to work she had done
27 prior to January. Based upon her commission percentage, she
28 calculated that her compensation would have been \$11,180.64.

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1 Ms. Schmidt also prepared Exhibit D-74 to show that the payments
2 SBS made to her in January and February of 2009 (Ex. P-37), which
3 total \$15,721.19, related solely to her work done in December 2008.
4 I conclude from this evidence that Ms. Schmidt has been fully paid
5 for her work performed prior to January 2009.⁶

6 What remains is to determine what, if anything, Ms. Schmidt is
7 owed for her work performed in January and the first part of
8 February 2009. SBS contends that Ms. Schmidt should not receive
9 any compensation for January and February because she did not fully
10 perform her work and as a result, SBS was forced to write off
11 portions of the customers' bills because of the disruption caused
12 by Ms. Schmidt's termination. Specifically, SBS contends that
13 Ms. Schmidt breached her obligations in January of 2009 by failing
14 to complete all of her billing responsibilities, to prepare her
15 January month end reports, and to timely return all records and
16 electronic information to SBS so that SBS could complete the work
17 for Ms. Schmidt's customers.

18 I find that Ms. Schmidt's termination was a mutual one and
19 that SBS is equally responsible for whatever disruption resulted.
20 I further find that Ms. Schmidt substantially complied with her
21 obligations in January. She testified that she uploaded all of the
22 patient information she received and she promptly made electronic
23 data and hard copy records available to SBS after SBS' written
24

25 ⁶ Ms. Schmidt contends in her trial brief that she is owed
26 \$11,380 for December 2008. She corrected that number, which is
27 shown in Ex. D-69, to \$11,180.64, as shown in Ex. D-69A. She did
28 not dispute the payments to her shown in Ex. P-37, however, and
testified at trial that all of the payments shown in Ex. P-37
related to work she had done in December, which proved that she had
not been paid for her *January* work.

1 demand was made on February 9, 2009. Although Ms. Hatter and
2 Ms. Huffman testified that the records were "a mess", when pressed
3 on cross examination, Mr. Hatter admitted that the records were
4 incomplete only as to five of Ms. Schmidt's 45 customers. Given
5 that these 45 customers represented 64% of SBS' total customers, it
6 is not surprising that the transition was a difficult one. In
7 fact, the smoothest of transitions, which this one was not, would
8 still have been difficult. Finally, Ms. Hatter's testimony made it
9 clear that she wrote off customer bills in order to retain goodwill
10 with those customers for her own business reasons. Her decision to
11 make those concessions does not permit her to avoid her legal
12 obligations to Ms. Schmidt. Accordingly, I find that Ms. Schmidt
13 is entitled to reasonable compensation for her billing work
14 performed in January and February.

15 Exhibit P-50 shows receipts and billings for SBS in February
16 and March 2009. Ms. Hatter testified that had she billed all of
17 the amounts due clients of Ms. Schmidt for that month, Ms. Schmidt
18 would have been entitled to compensation of \$12,297.52. That
19 number would be consistent with Ms. Schmidt's average monthly
20 compensation in 2008 of approximately \$12,000. Ms. Schmidt
21 contends that she should also be paid \$3,000 for her one week of
22 work in February 2009. Balancing the relative fault of SBS and
23 Ms. Schmidt in the transition of clients, I conclude that
24 Ms. Schmidt is entitled to compensation of \$10,000 for January and
25 February.

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MEMORANDUM DECISION - 20

1 **F. Ms. Schmidt's counterclaim for negligent infliction of**
2 **emotional distress.**

3 Under Washington law, negligent infliction of emotional
4 distress damages are not available for a breach of contract.
5 *Gaglidari v. Denny's Restaurants*, 117 Wn. 2d 426, 815, P.2d 1362
6 (1991)(traditional common law doctrine provides that tort damages
7 for emotional distress caused by breach of an employment contract
8 are not recoverable). In addition, proof of negligent infliction of
9 emotional distress requires the defendant to provide proof of
10 objective symptomatology. See *In Kloepfel v. Bokor*, 149 Wash.2d
11 192, 193, 66 P.3d 630 (2003)(court held that "the objective
12 symptomatology requirement" properly applies to the tort of
13 negligent infliction of emotional distress).

14 Ms. Schmidt testified that the process of renegotiating her
15 expired Subcontractor Agreement and circumstances surrounding what
16 she considered to be her termination by SBS were emotionally
17 upsetting to her and resulted in her gaining 40 pounds. She
18 provided no expert or medical testimony of any objective
19 symptomatology as required by *Kloepfel*, accordingly, her claim for
20 emotional distress damages against SBS must fail.

21 **G. Nondischarge.**

22 Having concluded that SBS is not entitled to any affirmative
23 monetary relief from Ms. Schmidt or Liberty, there is no need to
24 consider nondischargeability under Section 523(a)(6). The
25 obligation of Ms. Schmidt to return to SBS all Protective
26 Information in her possession or control (*i.e.* information in
27 possession of Liberty) that does not pertain to the SBS Former
28 Clients is nondischargeable.

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CONCLUSION

For the foregoing reasons, I will enter an order (i) requiring Ms. Schmidt and Liberty to return or destroy all Protected Information as described above which is not related to the SBS Former Clients and which remains on their computers or in their possession; (ii) finding in favor of Ms. Schmidt on her counterclaim for unpaid compensation in the amount of \$10,000; and (iii) dismissing all other respective claims of the parties. Counsel for defendants is instructed to note an order and judgment consistent with this decision for presentation.

///END OF MEMORANDUM///


United States Bankruptcy Judge
(Dated as of Entered on Docket date above)